

SELECTED ENVIRONMENTAL HEARING BOARD AND RELATED DECISIONS OF 2007

Administrative Finality

The Board denied a motion in limine in *Angela Cres Trust of June 25, 1998 v. DEP*, EHB Docket No. 2006-086-R (Opinion issued October 11, 2007), and held that the appellant's challenges to the extension of a water obstruction and encroachment permit were not barred by the doctrine of administrative finality. The Board concluded that the central issue was whether it was appropriate for the Department to have extended the permit based upon up-to-date information.

Attorney's Fees

In *Solebury Township v. Department of Environmental Protection*, 928 A.2d 990 (Pa. 2007), the Supreme Court held that the fee-shifting provision of Section 307 of the Clean Streams Law could be applied to litigation concerning water quality certifications. The Court went on to hold that formal judgment in favor of the appellants was not necessary in order to find that they had achieved some level of success on the merits, where the appeal had been dismissed as moot when the Department withdrew the certification. The appeal was remanded to the Board to determine whether an award of attorney's fees was proper.

In an opinion following the remand from the Supreme Court, the Board held that a party who did not appeal from an order of the Board denying a petition for attorney's fees was precluded from participating in the matter on remand in *Solebury Township v. DEP*, EHB Docket No. 2002-323-L (consolidated)(Opinion issued December 6, 2007). The Board further held that a municipal party could amend its fee petition to include Section 307 of the Clean Streams Law as a basis for recovery.

Discovery

The Board denied the Department's motion for a protective order for the discovery of raw gas sampling data. After reviewing the deposition testimony of the Department's expert witness the Board concluded that the expert had relied on the data and therefore it was discoverable. It was not relevant that the data was in the form of "notations" and may not ultimately be admissible or useful. *Snyder Brothers, Inc. v. DEP*, EHB Docket No. 2006-002-L (Opinion issued January 30, 2007).

Enforcement

The Board assessed a civil penalty for \$35,500 for 87 violations of the Clean Streams Law against the operator of a mobile home park in *DEP v. Kennedy*, EHB Docket No. 2005-299-CP-L (Adjudication issued January 22, 2007). The Board found that the

operator's behavior was at best reckless, and given the number of violations and his failure to respond to numerous warnings by the Department, that penalty (which was more than the \$26,800 requested by the Department) was appropriate.

The Board also assessed a civil penalty for violations of the Clean Streams Law against a developer for failing to install appropriate BMPs, failing to acquire an appropriate NPDES permit and failing to secure approval of erosion and sedimentation plans. The \$21,000 penalty was based in large part on the developer's repeated, careless failure to install pollution controls and secure appropriate approvals and as a deterrent factor. *DEP v. Angino*, EHB Docket No. 2003-004-CP-L (Adjudication issued March 13, 2007).

The Board dismissed an appeal from a \$9,000 civil penalty assessment issued to an owner of a mobile home park. In *Gordon v. DEP*, EHB Docket No. 2005-323-R (Adjudication issued April 26, 2007), the Board found that the Department had established that the appellant was improperly disposing of waste on the property and that the penalty was a reasonable fit given the circumstances of the violation.

The Board upheld the denial of an application to renew a wastewater systems operator's license because the applicant had been convicted of three misdemeanors related to his operation of a wastewater system. *Swinehart v. DEP*, EHB Docket No. 2006-056-L (Opinion issued May 18, 2007). The Board explained that the denial did not violate double-jeopardy principles because a criminal conviction does not preclude the imposition of civil consequences. Therefore the action of the State Board for Certification of Water and Wastewater Systems Operators was reasonable and appropriate.

The Board reduced a civil penalty for fugitive dust and other violations in *Eureka Stone Quarry v. DEP*, EHB Docket No. 2006-044-MG (Adjudication issued August 6, 2007)¹, from \$175,300 to \$93,350. The Board found that the penalties were not a reasonable fit and that there was no basis for doubling the base penalty for one of the violations pursuant to the Department of Environmental Protection's guidance document. The Board did hold, however, that the quarry was liable for fugitive dust related to the removal of overburden since the "clearing of land" exception set forth in the regulations applied only to removal of trees, stumps and scrub from the surface of the land and not to removal of overburden down to bedrock. The Board also found that the operator had been properly placed on the air pollution compliance docket, and that its placement on the docket did not form a basis for reducing the penalty.

The Board assessed a civil penalty of \$18,500 for violations of the Clean Streams Law and Dam Safety and Encroachments Act in *DEP v. Pecora*, EHB Docket No. 2006-114-CP-L (Adjudication issued October 4, 2007). The Board based the penalty largely upon the defendant's unexcused delay in complying with an order of the Department resulting in sediment pollution to an adjacent exceptional value wild trout stream.

¹ The adjudication has been appealed to the Commonwealth Court.

Land Use

The Board granted a motion for summary judgment in *HJH, LLC v. DEP*, EHB Docket No. 2006-152-MG (Opinion issued April 30, 2007), in a challenge to a decision by the Department to suspend review of a municipal waste permit application pending resolution of a land use dispute. The Board held that Act 67/68 of the Municipalities Planning Code, which requires the Department to consider land use issues in certain circumstances, does not require the Department to determine the legitimacy of a particular land use dispute.

Final Actions

The Board found that a notice of violation which requests the permittee to review its records to determine the source of a material discharged from an outfall was not a final action. Rather, the letter was written in the context of an ongoing study of a review of an NPDES renewal, and therefore lacked the characteristics of a final action affecting personal or property rights. *Langeloth Metallurgical Co. v. DEP*, EHB Docket No. 2006-272-L (Opinion issued July 5, 2007).

Intervention

The Board denied a motion to intervene by an individual in a series of appeals involving actions by the Department relating to sewage facilities in *Bucks County Water and Sewer Authority v. DEP*, EHB Docket No. 2006-225-MG, 2007-058-MG, 2007-145-MG (Opinion issued August 8, 2007). The Board found that the interest of the petitioner was in the settlement discussions among some of the parties and not in the subject-matter of the appeals.

Mining

The Commonwealth Court affirmed the Board's adjudication in *UMCO Energy, Inc. v. Department of Environmental Protection*, 938 A.2d 530 (Pa. Cmwlth. 2007), and held that the Department had the authority to restrict the mine operator to "room-and-pillar" mining in order to prevent the dewatering of a perennial stream on the property. Specifically, the court rejected the argument that the Mine Subsidence Act supersedes the Clean Streams Law. The court also rejected the petitioner's claim of discriminatory enforcement.

In *Lower Milford Township v. DEP*, EHB Docket No. 2006-109-L (Opinion issued June 26, 2007), the Board held that the Noncoal Surface Mining Act does not require a permit for exploration so long as no minerals are removed from the site. The rather limited activities associated with test borings clearly do not fall within the definition of operating a surface mine, and since there was no extraction of minerals, there were no activities "in connection with" surface mining. Therefore the permit requirements of the Act did not apply.

Similarly, in *Keck v. DEP*, EHB Docket No. 2005-280-L (consolidated)(Adjudication issued June 26, 2007), the Board held that exposing a seam of coal, but not removing any coal or otherwise excavating the coal, regardless of his future intent, is not “mining of coal” under the Surface Mining Conservation and Reclamation Act. Therefore the Department erred in assessing a civil penalty against the appellant for coal mining without a permit.

The Board held that the presumption of liability set forth in Section 1396.4b(f)(2) of the Surface Mine Act applies to an operator who is alleged to have affected a domestic water supply of landowners caused by the operator’s construction and operation of an access road included in coal exploration activities. *Cumberland Coal Resource, LP v. DEP*, EHB Docket No. 2006-234-R (Opinion issued August 23, 2007).

The Board, in *Stout v. DEP*, EHB Docket No. 2007-052-R (Opinion issued August 17, 2007), denied a motion to stay proceedings in an appeal seeking costs allegedly associated with interruption of the appellant’s business during undermining. The appellant sought to stay proceedings before the Board pending resolution of a related action in the court of common pleas alleging that the appellant had entered into an oral contract with the mining company with regard to the payment of such costs. The stay was denied on the basis that the Environmental Hearing Board has exclusive jurisdiction to hear appeals from actions of the Department of Environmental Protection. The opinion further noted that the Board may be called upon to decide whether an oral contract was entered into between a property owner and mining company in determining whether the Department acted correctly in denying the property owner’s claims for incidental damages.

The Board held that the Department correctly approved a Determination of Applicability for the beneficial use of mixed residual waste for reclamation of an abandoned mine site, except for the groundwater monitoring plan in *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, EHB Docket No. 2006-005-L (consolidated)(Adjudication issued November 2, 2007). Specifically the Board found that the monitoring plan failed to demonstrate that it was capable of detecting the off-site migration of contaminants, and remanded the plan to the Department for further analysis.

Mootness

The Board found that a challenge to a surface mining permit is not moot even though all the coal had been removed from the site in *Concerned Citizens of Ligonier v. DEP*, EHB Docket No. 2005-314-L (Opinion issued February 13, 2007). Part of the appellant’s appeal was a challenge to the adequacy of the reclamation plan found in the permit. Therefore should the appellants prevail, it is conceivable that the Board could offer relief by ordering a modification of that portion of the permit.

NPDES

The Board denied summary judgment in *BP Products North American, Inc. v. DEP*, EHB Docket No. 2005-032-L (Opinion issued January 11, 2007), and held that the Department is not required to use the effluent limits contained in a general permit when it issues an individual NPDES permit for a petroleum marketing terminal. The Board also noted that the question of whether the limits were reasonable was clearly a question of material fact which had to be resolved at hearing.

In *Upper Gwynedd Township v. DEP*, EHB Docket No. 2005-358-MG (Opinion issued January 30, 2007), the Board denied a motion for summary judgment finding that there were numerous issues of material fact in dispute concerning the propriety of imposing a year-round phosphorus effluent limit. Specifically, it was unclear that the Department had improperly applied Section 96.5(c), which requires a 2 mg/l phosphorus limit for waters impaired by nutrient pollution, by imposing the strict limit during both cold months and warm months.

Permits

The Commonwealth Court affirmed a decision of the Board in *Shenango, Inc. v. Department of Environmental Protection*, 934 A.2d 135 (Pa. Cmwlth. 2007), holding that the Department did not exceed its authority or act unreasonably by including concentration limits for pH in an NPDES permit. Both state and federal regulations gave the Department authority to set concentration limits in addition to mass limits in NPDES permits. In this case, the Department was justified in doing so by the permittee's lack of compliance with the limitations in prior permits.

Representation

The Board denied a motion to disqualify the intervener's counsel in *Perrin v. DEP*, EHB Docket No. 2007-118-R (Opinion issued September 28, 2007). Although the appellant had a consultation with the intervener's firm, the consultation was on a matter unrelated to the appeal and occurred more than eight months before the Department issued the sewage facilities plan under appeal.

Sewage Facilities

The Board dismissed an appeal challenging the Department's granting of an exemption from an Act 537 Plan revision to a residential developer. *Walker v. DEP*, EHB Docket No. 2005-274-K (consolidated)(Adjudication issued February 8, 2007). Although the developer later increased the lot size from one acre to one and a half acres, the Department did not abuse its discretion by not requiring another certification from a sewage enforcement officer because the subdivision still met the regulatory requirements for an exemption from the official plan revision requirements.

The Board remanded a private request to the Department, where the Board found that the Department did not exercise independent judgment in evaluating whether or not the municipality's Act 537 Plan was not being implemented or was inadequate to meet the land developers needs. *Heritage Building Group Inc. v. DEP*, EHB Docket No. 2006-072-MG (Adjudication issued May 16, 2007). Specifically, the Board found that the Department blindly relied on the municipality's position that the developer failed to adequately consider spray irrigation, even though the developer's experts testified that the proposed community wastewater system would offer more groundwater recharge than spray irrigation which is necessary to protect bog turtle habitat located on the site.

Solid Waste

The Supreme Court reversed a decision of the Commonwealth Court which held that the Board erred in concluding that whole discarded tires at a facility constituted "waste" under solid waste regulations in *Tire Jockey Service Inc. v. Department of Environmental Protection*, 915 A.2d 1165 (Pa. 2007). Specifically, the Court concluded that the Board had properly found that the Department's interpretation of the regulations was reasonable and that none of the exemptions from the definition of waste regarding recycled waste applied.

In *Seneca Landfill, Inc. v. DEP*, EHB Docket No. 2006-012-R (Opinion issued July 5, 2007), the Board granted summary judgment to the Department of Environmental Protection on the question of whether the Department had issued to landfill appropriate refunds of disposal fees that had been improperly collected under Act 90. The refunds came about following the Commonwealth Court's ruling in *Joseph J. Brunner, Inc. v. DEP*, 869 A.2d 1172 (Pa. Cmwlth. 2005), *appeal denied*, 85 A.2d 44 (Pa. 2005), held that process residue and nonprocessable waste did not need to be generated by a resource recovery facility in order to qualify for the exemption pursuant to Section 6301(b)(1) of Act 90. In issuing the refunds, the Department refunded fees paid by non-petitioning landfills back to the *Brunner* decision and for petitioning landfill fees paid up to six months prior to the date of their petition for a refund. In no case except that of the Brunner landfill did the Department issue refunds back to the inception of the fee. The Board found that the Department had complied with the refund provisions of Section 702(e) of Act 101 in issuing the refunds and granted summary judgment in its favor.

The Board held in another Act 90 refund case, *Veolia ES Greentree Landfill, LLC v. DEP*, EHB Docket No. 2006-073-R (Opinion issued July 5, 2007), a landfill's appeal from a refund letter was neither untimely nor barred by administrative finality. The Board rejected the Department's argument that an earlier letter containing a refund check was its final action. The letter did not reference Veolia's refund petition and was not addressed to Veolia's counsel who had filed the petition and, further, where the testimony of Department officials was that Veolia's petition had no bearing on the amount of the refund or the contents of the letter, the Board could not conclude as a matter of law that the letter was a final decision on the refund petition.

The Board found that a landfill operator produced sufficient evidence at a hearing to demonstrate that its proposed expansion application demonstrated that there was minimal potential for mine subsidence, settlement or groundwater contamination. Accordingly, the Department improperly denied the expansion application. Specifically the Board found that the Department failed to substantiate its position that the operator had failed to provide sufficient information to address the Department's concerns with any evidence to rebut the claims made and supported by the operator at the hearing. Therefore the Board remanded the application to the Department for further consideration. *Environmental & Recycling Services, Inc. v. DEP*, EHB Docket No. 2006-161-C (Adjudication issued October 9, 2007).

Stay

The Board refused to grant a request for a stay filed by an appellant in an appeal from a Department determination under the Mine Subsidence and Land Conservation Act in *Stout v. DEP*, EHB Docket No. 2007-052-R (Opinion issued August 17, 2007), where the appellant had filed a writ in the court of common pleas relating to an alleged oral contract between the appellant and the Department concerning incidental costs in a claim for damages caused by mine subsidence. The Board held that it had exclusive jurisdiction to review Department determinations under the Mine Subsidence Act and could review the Department's reliance on any oral contract that may or may not exist incidental to its authority to review Department actions.

Summary Judgment

The Board issued a series of decisions holding that summary judgment is only appropriate where there are very few material facts and the matter can be resolved as a question of law. Where the parties sought judgment on an issue that required expert testimony or involved a complex technical matter, the Board refused to render judgment, holding that a hearing on the merits was much more appropriate. *Citizen Advocates United to Safeguard the Environment*, EHB Docket No. 2006-005-L (Opinion issued February 6, 2007); *Borough of Ambler v. DEP*, EHB Docket No. 2005-336-MG (Opinion issued July 2, 2007); *Parks v. DEP*, EHB Docket No. 2006-199-L (Opinion issued July 16, 2007).